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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary, Federal Communication Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Ex Parte Presentation of Covad Communications Company in

CC Docket No. 00-4, *Application by SBC Communications Inc., et. Al. For Provision of In-Region, InterLATA Services in Texas*

Dear Ms. Salas,

At the request of Commission staff, on the afternoon of February 29, 2000, Thomas M. Koutsky and Chris Goodpastor of Covad Communications Company had a telephone conference with Bill Dever and Jessica Rosenworcel of the Common Carrier Bureau, Policy Division. Commission staff had requested the call in order to obtain Covad's initial reaction to the reply comments of the Texas Commission in this proceeding. During the call, Covad made the following points:

1. *The Texas Commission Has Unilaterally Revised the FOC Performance Measurements to help SBC pass muster.* The Texas Commission's Reply (at p. 5) claims that SBC's performance on FOCs (e.g., PM 5-17) should measure SWBT's performance only *after* SWBT has performed the "loop qualification" process, a process that SWBT decides will take 3-5 business days after receipt of a complete Local Service Request ("LSR"). However, this interpretation is not consistent with the clear Business Rule for PM 5, which states that it measures the "specific time frame from receipt of a complete and accurate service request to return of confirmation to CLEC." In essence, the Texas Commission's evaluation of SWBT's FOC performance gives SWBT *five additional business days* to comply with the FOC measurement. This change effectively increases Covad's FOC interval from one to six business days. Since SWBT's "installation" metrics (e.g., PM 55.1) are all triggered by the promised due date contained on the FOC, delays in receiving FOCs ratchet through SWBT's entire PM system for unbundled loops. As a result, Covad strongly objects to this unilateral modification in the

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Business Rule for this measurement.[1] The FCC simply cannot ignore SWBT's utter failure to meet its 24-hour FOC commitment benchmark.[2]

2. *The Texas Commission has improperly altered the benchmark for PM 55.1 from Parity to SWBT's DSL Service to Parity to DS-1 Service.* As demonstrated by Covad, Rhythms, NorthPoint, the DOJ and other commenters in this proceeding, SWBT's data for PM 55.1 (DSL Installation Time) is highly suspect and unreliable. Even so, SWBT's reportage on PM 55.1 shows considerable discrimination between CLEC DSL loops and SWBT's retail DSL performance.

SWBT and the Texas Commission try to dance around these results by arguing that comparison to SWBT's DSL service is no longer an adequate benchmark to compare CLEC DSL loop delivery. The time to make that point would seem to have been earlier in this process, when these measurements were being written—not now, in the middle of the FCC's 90-day review of SWBT's application. There are several reasons why comparison between CLEC stand-alone DSL lines and retail DS-1 special access circuits is inappropriate—

- A DSL-1 circuit is a designed retail service, unlike a CLEC DSL loop, which oftentimes is physically no different than the same twisted copper pair utilized for analog, circuit-switched service;

- A DS-1 circuit requires the use of *two* twisted copper pairs, while a CLEC DSL loop requires only *one* twisted copper pair.[3]

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[1] The Texas PUC also suggests that Covad's internal numbers do not exclude weekends and holidays. This is incorrect—Covad's internal numbers monitor SWBT's performance in business days. *See* Decl. Matthew Wall ¶ 24. These numbers also show that SWBT's performance degraded through 1999, to the point that in December 1999, it met this benchmark only 11.46% of the time. *Id.*

[2] In addition, the Conway Reply and Dysart Reply Affidavits try to explain SWBT's poor FOC performance to Covad by indicating that there is a difference between the date SWBT "transmits the FOC" and the date Covad "receive[s] the FOC from their fax machine." Conway Reply Aff. ¶ 37; Dysart Reply Aff. ¶ 93. As proof of the existence of this temporal anomaly, Conway attaches 10 fax cover sheets. Upon examination, this evidence is nothing more than fax cover sheets from ten of the loops described in the Reconciled Covad/SWBT Order Data, attached to the Michael Smith Decl., prepared jointly by Covad and SWBT in November 1999 and submitted to the Texas Commission. *See* Michael Smith Decl. (Jan. 31, 1999) at ¶¶ 23-28. All of the fax cover sheets attached to the Conway Reply relate to loops where Covad and SWBT could not agree on when a FOC was returned. Interestingly, one fax cover sheet shows that SWBT dated its response on a Friday but did not transmit that to Covad until a Monday.

The fact that Covad and SWBT could not agree with some of the Reconciled Data was admitted by Covad witness Smith at ¶ 27 and is hardly news. What is important is that the Texas Commission was informed of these results in November 1999 and since that time, the Texas Commission has not tried to gather and reconcile Covad and SWBT data. Simply pulling ten fax cover sheets out of the blue—a miniscule percentage of the total volume of Covad loop orders in Texas in 1999 (*see* Wall Decl. Ex. MW-1, MW-2)—is hardly probative evidence as to whether SWBT has provided Covad timely FOCs.

[3] As a result, the "parity" benchmark for performance measurements designed to measure facilities availability, such as PMs 60 and 61, would be entirely skewed. Common sense would say that it is *twice* as likely that a DS-1 order, which uses two pairs, would be delayed than a DSL loop order because of a lack

- A DS-1 circuit needs to have repeaters installed every 3,000 feet—unlike a DSL loop, which is a "plain copper loop" with no such electronics.[4]

3. *The attempt to change the benchmark for evaluation of nondiscriminatory access to BRI ISDN Loops is flawed.* With regard to BRI ISDN loops—loops critical to the provision of advanced services—the DOJ and CLECs clearly proved that SWBT was providing discriminatory access. SWBT and the Texas Commission seek to argue out of this quandary by asserting that it is no longer proper to compare provision, maintenance and repair measurements of CLEC BRI ISDN loops to SWBT retail ISDN service.[5] The Texas Commission seems to have bought into SWBT's argument that use of BRI ISDN loops "is not entirely compatible with the industry standard ISDN loop."[6]

   This position is incorrect. Indeed, IDSL is the foundation for the ISDN standard. At its core, ISDN is a "digital" service, and the first two physical layers of an ISDN service are, in fact, the protocols used by IDSL. For example, Bellcore 000393 governs the first two physical layers of standard ISDN service and is, in essence (along with ANSI T1.601), the technical standard for IDSL. In the Interconnection Agreement between Covad and SWBT (attached to the Goodpastor Reply Decl.), section 4.1.2 specifically defines a "2-Wire Digital Loop (e.g., ISDN/IDSL)" as a loop that "supports Basic Rate ISDN (BRI) digital exchange services."

   The Chapman Reply Affidavit at ¶¶ 15-19 tries to blame the poor service CLECs receive from SWBT for BRI ISDN loops upon CLEC IDSL equipment. This is also incorrect. Chapman discusses a problem with the "DISC*S pairgain system", manufactured by Marconi,[7] and SWBT's attempts to "go[] out of its

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of available loops. If "parity" to DS-1s became the rule, then SWBT would be free to reject CLEC 2-wire DSL loop orders at twice the rate it rejects two-wire analog loops before the DS-1 parity comparison were implicated.

[4] As a result, SWBT's average time to install a DS-1 circuit would include the time needed to dispatch a technician to install these repeaters. Thus, a DS-1 comparison would give SWBT extra time to provide Covad a DSL loop. Once again, a true apples-to-apples comparison would compare CLEC DSL loops to other two-wire services, such as retail DSL service, analog POTS, or ISDN. SWBT certainly knows how to provide retail DSL service—it is aggressively cutting retail DSL prices and claims to be the nation's largest DSL provider, with 169,000 installed DSL lines. *See* SBC, *SBC Cuts Price of DSL Internet Service*, Feb. 14, 2000, http://www.sbc.com/News_Center/Article.html?query_type=article&query=20000214-02.

[5] Once again, these arguments could have been raised when these performance measurements were drafted.

[6] SWBT Reply at 26, Chapman Reply ¶¶ 13-17.

[7] Chapman Reply at ¶ 15. Although Chapman makes some very broad statements about "CLECs' technical difficulties" (¶ 18) and the "fact that IDSL technologies employed by data CLECs have more

way" to "work around" that problem. What Chapman fails to mention is that the problem is with the Marconi DISC*S pairgain system—a system that SWBT chose to install in its local loop plant. In fact, certain slots in this Marconi system are non-compliant with Bellcore TR 000393/ANSI T1.601 and cannot support standards-based IDSL or ISDN services. ILECs often "tag" a particular slot in the DISC*S system that cannot support ILEC retail ISDN service in its loop information database, and the same procedure could be used to tag slots for CLEC IDSL loop orders.[8]

The Commission should reject SWBT's attempt to blame its discriminatory treatment by reference to this problem with the equipment that *SWBT has chosen to deploy*. The fact is that SWBT has deployed a Digital Loop Carrier system that does not comply with Bellcore TR 000393 and ANSI T1.601 standards—even SWBT's ISDN service will not work in certain slots of the DISC*S system. SWBT works around this problem for itself. The fact that it must "work around" this problem is *not* the fault of Covad or any other data CLEC—the fault lies with SWBT's decision to purchase nonconforming equipment.[9]

4. *The Texas Commission's efforts to alter the performance measurements to excuse SBC's poor performance reinforces the need to actually implement necessary DSL-related changes to the system.* The performance measurements SBC relies upon in support of its application are clearly deficient with regard to DSL loops. Obvious faults in SWBT's data collection remain.[10] As discussed in points (1), (2) and (3) above, the Texas Commission can only make its "evaluation" by substantially and unilaterally altering the business rules and benchmarks of the current performance measurement system. As of this writing, the Texas

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restrictive facility assignment criteria" (¶ 19), the only such issue Covad has encountered—and that SWBT specifically points to—is the problem with this DISC*S system.

[8] Upon discovering this defect, Covad initiated testing of the Marconi system in Texas with Marconi personnel. It is disingenuous for SWBT to characterize this as Covad "working with *their* vendors" (Chapman Reply ¶ 16, emphasis added), because in reality, Covad is forced to work with *SWBT's* vendor Marconi. Covad has engaged in similar testing with U S WEST, which has also deployed the Marconi DISC*S system, and the parties have been able to work around the issue.

[9] In addition, SWBT has not provided the Commission any information on the extent that it has deployed this DISC*S system in Texas. Even taking SWBT's word that the DISC*S system results in longer installation and more trouble reports for BRI ISDN loops than for retail ISDN service, to explain the gross disparity in performance documented by CLECs and the DOJ, the Commission would need to know the extent and where SWBT has deployed the DISC*S system. If the DISC*S system is only deployed in Houston, for example, those problems cannot be an excuse with regard to SWBT's performance in Dallas.

[10] For instance, the Covad FOC data summarized in the Dysart Reply Affidavit only includes a small minority percentage of Covad's loop orders in Texas during the relevant months (*compare* Dysart Reply Aff. ¶ 92 *with* Covad Matthew Wall Decl., Exhibit MW-1, filed Jan. 31, 2000). Incidentally, inclusion of Covad confidential information in the public-filed version of the Dysart Reply Affidavit violates the Covad-SWBT interconnection agreement. Covad has informed SWBT of this matter and has demanded that SWBT withdraw the Dysart Reply Affidavit and recover all versions of the Affidavit that have been distributed to the public. *See* Attachment A.

Commission has not implemented these necessary changes to the performance measurement system. On February 21, 2000, Covad and Rhythms jointly filed proposed performance measurements with the Texas Commission, and SWBT filed proposed changes as well. As a result, the FCC is in the unenviable position of evaluating this application under a PM and data gathering system that *all parties* now agree to be unreliable, incomplete, and inadequate with regard to xDSL-compatible loops. As shown by DOJ, all evaluations or conclusions based upon data collected pursuant to the current PM system are inherently suspect.

5. *The Texas Commission did not compare SWBT's November-January Data with Covad (and probably other CLEC) Data.* The Texas Commission claims to have conducted an "independent evaluation" of SWBT's performance for November 1999, December 1999 and January 2000. The Texas Commission did not request Covad to provide Covad's data for this time period—despite Covad's evidence in this proceeding (filed Jan. 31, 2000) which showed that SWBT's performance reports excluded giant swaths of Covad orders. Unlike New York, where the NYPSC was actively involved in obtaining and reconciling data from CLECs and Bell Atlantic alike, CLECs appear to have been excluded wholesale from the "independent evaluation" the Texas Commission recently undertook.

In addition, Covad has learned through discussions with Texas Commission staff that the Texas Commission's affiant, Nara Srinivasa, did not request any raw data from SWBT to conduct this evaluation. Mr. Srinivasa only received from SWBT reports generated from this raw data. Given the clear faults with SWBT's data collection process—which still seem to exist, given SWBT's continuing inability to track all of Covad's LSRs for FOC performance[11]—the Texas Commission's "evaluation" of these incomplete SWBT reports is not credible. Because of the inherent faults in the data collection process and the Texas Commission's failure to solicit input from CLECs, the Texas Commission's Reply Comment assessment should not be afforded *any*, let alone substantial, weight.

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[11] *See* note 10, *supra*.

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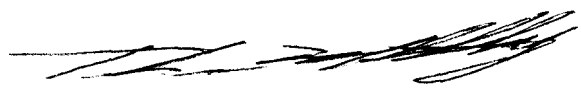
As discussed above, Covad is providing this information in response to Staff's request on February 29, 2000. Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.206(a)(2) of the Commission's rules.

Sincerely,



Thomas M. Koutsky

cc: Audrey Wright, Common Carrier Bureau
Bill Dever, Common Carrier Bureau
Jessica Rosenworcel
Katherine Farroba, Texas PUC
Luin Fitch, DOJ
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Attachment A

COVAD

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February 29, 2000

Via Email, Telecopy and US Mail

Mr. Timothy Leahy
Senior Counsel
Southwestern Bell Telephone Co.
1616 Guadalupe, Room 600
Austin, Texas 78701

Re: Breach of Interconnection Agreement—SBC's Public Disclosure of Covad's Confidential Deployment Information

Dear Mr. Leahy:

After reviewing the publicly filed Reply Comments and accompanying affidavits of SBC Communications, Inc. ("SBC") in CC Docket No. 00-4 before the Federal Communications Commission, we have discovered that SBC has disclosed confidential deployment data of Covad Communications Company ("Covad") in violation of the Interconnection Agreement between Southwestern Bell Telephone Company ("SWBT") and Covad. Specifically, paragraph 6.5 of Attachment 25 of the Interconnection Agreement provides that

> 6.5 SWBT shall keep CLEC deployment information confidential from SWBT's retail operations, any SWBT affiliate, or any other CLEC.

This paragraph of the Agreement is based, in part, upon the Arbitration Award at page 55:

> The disclosure of such highly sensitive information would be an anti-competitive, discriminatory and prejudicial action by SWBT against its competitors in violation of the

> FTA and PURA and threatens further development of a competitive advanced services market in Texas.
>
> ***
>
> Therefore, the Arbitrators additionally order SWBT to take all measures to ensure that CLEC deployment information is neither intentionally or inadvertently revealed in the future to any part of SWBT's retail operations, any affiliate, or any other CLEC without prior authorization from the affected CLEC.

Despite SWBT's contractual obligations and the availability of a protective order in CC Docket 00-4, SBC chose to include Covad's confidential retail information in paragraph 92 of the public version of Mr. Dysart's Reply Affidavit. Given SWBT's extensive efforts to protect its own retail information (including SWBT's refusal to grant Covad access to the raw data used to calculate its retail DSL performance), we are surprised at the lack of care afforded Covad's retail information. This Covad confidential information not only has been filed with the FCC, but SWBT has posted this information on its Internet Web Site, http://www.sbc.com/Long_Distance/Home.html, where it is readily available to the public.

To prevent any further harm to Covad from this serious, ongoing breach, we ask that SBC immediately secure the return of all Covad deployment information from any publicly available source, including SBC's website, and from any private party to whom SBC disclosed such information. We also ask that SWBT take all efforts to recover this information from all SWBT retail personnel that have obtained copies of this data. In addition, we ask SBC to immediately withdraw the reply affidavit of Mr. Dysart from CC Docket 00-4, to notify the FCC and the Texas PUC of SBC's disclosure of Covad's confidential information, and to take affirmative measures to prevent the unauthorized disclosure of such information in the future. In particular, we ask that SWBT certify to the FCC and the Texas PUC that it has taken these steps and that it has implemented firewalls that will prevent the use of the regulatory process to pass confidential CLEC information to SWBT retail personnel. You are also on notice that Covad reserves the right to invoke the dispute resolution provisions of the Covad/SWBT Interconnection Agreement to further compensate for damage done to Covad due to this breach.

Please confirm your compliance with this request no later than Thursday, March 2, 2000.

Very truly yours,

Christopher V. Goodpastor

Christopher V. Goodpastor

Cc: Ms. Radhika Karmarkar
FCC Enforcement Bureau

Mr. Anthony J. Dale
FCC Common Carrier Bureau

The Honorable Katharine Farroba
Public Utility Commission of Texas